APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued January 22, 1974

February 22, 1974

Before

Hon. Latham Castle, Senior Circuit Judge
Hon. Roger J. Kiley, Senior Circuit Judge
Hon. John Paul Stevens, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 73-1767 vs.

JOSEPH P. GLIMCO and LENA GLIMCO,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

NO. 70 C 289

Edwin A. Robson, Judge.

ORDER

On June 30, 1961, the Commissioner of Internal Revenue informed appellant and her husband that they had underpaid their joint income tax for the years 1954-57 by nearly $200,000. They then sought review by the Tax Court, which upheld the Commissioner's determination.

The deficiencies were assessed against appellant and her husband some two months later. This court affirmed the decision of the Tax Court, and, on December 9, 1968, the Supreme Court denied certiorari. *Glimco* v. *Commissioner*, 397 F.2d 537 (7th Cir. 1968), *cert. denied*, 393 U.S. 981.

Pursuant to 26 U.S.C. §§ 7401 & 7403, the government commenced this action against appellant and her husband to reduce the tax assessments to judgment and to foreclose the federal liens against certain property. Jurisdiction was properly predicated upon 26 U.S.C. § 7402 and 28 U.S.C. §§ 1340 & 1345. Appellant moved to dismiss on the basis of the "Innocent Spouse Statute." This statute, enacted some two years after the Tax Court's decision became final,[1] relieves certain spouses of tax liability attributable to income omitted from a joint return by the other spouse.[2] The district court denied the motion, *United*

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[1] The Tax Court's determination that appellant and her husband were liable for the taxes involved in the present case became final when the Supreme Court denied certiorari. 26 U.S.C. § 7481(2)(B).

[2] The statute provides:

(e) Spouse Relieved of Liability in Certain Cases.—

(1) In general.—Under regulations prescribed by the Secretary or his delegate, if—

(A) a joint return has been made under this section for a taxable year and on such return there was omitted from gross income an amount properly includable therein which is attributable to one spouse and which is in excess of 25 percent of the amount of gross income stated in the return,

(B) the other spouse establishes that in signing the return he or she did not know of, and had no reason to know of, such omission, and

(C) taking into account whether or not the other spouse significantly benefitted directly or indirectly from

(footnote continued on next page)

States v. *Glimco,* 331 F.Supp. 449 (N.D. Ill. 1971), and later entered judgment in favor of the government.

Appellant's sole contention is that the district court erred in denying her motion to dismiss. The district court's determination, however, was in accord with our decision in *United States* v. *Zimmerman,* 478 F.2d 59 (7th Cir. 1973). There we held that: 1) an innocent spouse may not utilize § 6013(e) to challenge a tax liability which has been conclusively determined; and 2) a Tax Court decision on the innocent spouse's liability which has become final is conclusive. We rejected the contention, also made here. that the enactment of § 6013(e) subsequent to a final Tax Court decision precludes this decision from being conclusive.

(Footnote continued)

> the items omitted from gross income and taking into account all other facts and circumstances, it is inequitable to hold the other spouse liable for the deficiency in tax for such taxable year attributable to such omission,
>
> then the other spouse shall be relieved of liability for tax (including interest, penalties, and other amounts) for such taxable year to the extent that such liability is attributable to such omission from gross income.
>
> (2) Special rules.—For purposes of paragraph (1)—
>
> (A) the determination of the spouse to whom items of gross income (other than gross income from property) are attributable shall be made without regard to community property laws, and
>
> (B) the amount omitted from gross income shall be determined in the manner provided by section 6501(e)(1)(A).

In § 3 of Pub. L. No. 91-679 Congress provided in part that this statute "shall apply to all taxable years to which the Internal Revenue Code of 1954 applies."

Appellant did not consider the applicability of *Zimmerman* in her briefs. At oral argument, however, counsel attempted to distinguish *Zimmerman* on two points. First, the innocent spouse in *Zimmerman* consented to entry of judgment against her by the Tax Court. She also filed an answer in the district court which admitted her liability and consented to entry of judgment against her for the amount requested by the government. Based upon these facts, we noted that the spouse waived her right to appeal not only the Tax Court decision but also the district court's decision. 478 F.2d at 62. According to appellant, *Zimmerman* thus stands for the proposition that an innocent spouse who, at any time, fails to contest her liability may not avail herself of § 6013(e); since appellant has continuously challenged her liability (in the original action and in the present action), *Zimmerman* is inapplicable.

Zimmerman should not be read so narrowly. With respect to the appeal of the Tax Court decision, waiver was important only insofar as it established that that decision was final. In the present case, it is irrelevant that appellant did not waive any right to appeal the Tax Court ruling. As already noted, that ruling became final when the Supreme Court denied certiorari. 26 U.S.C. § 7481. With respect to the appeal of the district court decision, we carefully indicated that waiver was an *alternative* ground for our decision. 478 F.2d at 62 n. 2. It in no way affected our primary holding (which has already been detailed).

Appellant's second distinction is that the spouse in *Zimmerman* did not assert § 6013(e) in the district court. Thus, according to appellant, *Zimmerman* simply stands for the proposition that an argument may not be made for the first time on appeal. While the spouse's failure to raise the § 6013(e) argument troubled Judge Pell in his

concurring opinion, 478 F.2d at 64, it formed no basis for the majority opinion.

In her reply brief appellant lists several arguments which, in effect, state that *Zimmerman* was incorrectly decided. Each of these arguments had previously been advanced by the plaintiff-appellant in *Mitchell* v. *Commissioner,* No. 73-1766 (7th Cir. 1974), which was heard by this court on the same day as the instant appeal. We rejected these arguments in *Mitchell* and reject them here.

In sum, we believe that the present case falls squarely within our holding in *Zimmerman* and that this holding is correct. Consequently, the district court properly denied appellant's motion to dismiss and entered judgment for the government.

Affirmed.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
April 9, 1974.

Before

Hon. Latham Castle, Sr. Circuit Judge
Hon. Roger J. Kiley, Sr. Circuit Judge
Hon. John Paul Stevens, Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 73-1767 vs.

JOSEPH P. GLIMCO and LENA GLIMCO,
Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

(70 C 289)

On consideration of the petition for rehearing filed in the above-entitled cause,

It Is Hereby Ordered that the petition for rehearing in the above-entitled appeal be and the same is hereby denied.